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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN CHRIST KIRBY, Defendant and Appellant.	E070006 (Super.Ct.No. SWF1403374) OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Kiefer, Judge. Affirmed with directions.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Kristen Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

After a jury trial, defendant and appellant, John Christ Kirby, was convicted of one count of attempted criminal threats with a weapon use enhancement (Pen. Code, §§ 422, 12022, subd. (b)(1))[1] and one count of misdemeanor obstructing a police officer (§ 148, subd. (a)(1)). At sentencing, defendant was granted probation and ordered to serve 261 days as a condition of probation with 261 days of credit for time served. Defendant timely appealed.

On appeal, defendant argues he was ineffectively represented at trial because his trial counsel did not request a jury instruction on voluntary intoxication's effect on defendant's specific intent. Defendant also argues that the trial court improperly calculated his presentence custody credits. We affirm the judgment but remand with instructions to award defendant 271 days of presentence custody credits and to prepare a supplemental minute order reflecting this change of presentence credits.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution's Evidence*

Defendant and John Doe are half brothers with the same mother (Mother). In 2014, Doe lived in Northern California. Sometime around April or May 2014, Mother moved from Northern California to live with defendant in Lake Elsinore, California. Mother was 88 in October 2014. Mother died prior to defendant's trial for reasons not related to this case.

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[1] All further statutory references are to the Penal Code.

Defendant asked Doe to bring some of Mother's personal items still in Northern California to defendant's home. Doe arrived at defendant's residence around 7:00 a.m. on October 4, 2014.

Defendant acted animated when Doe arrived. Defendant said that a cloud formation told him Jesus was coming or had come and that "Christians needed to be more aggressive." Doe found this behavior unusual and irrational, but was not alarmed. Doe left the house around 8:00 a.m. to visit an aunt and attend church. When Doe left, defendant was still expressing religious sentiments and acting animated. Doe became concerned at that point because he "didn't exactly know what was going on with [defendant]," and because defendant appeared stressed.

Doe returned to defendant's home around 2:00 p.m. When Doe returned, defendant was even more animated than before. Defendant was yelling, screaming, and seemed angry. Defendant was also walking around the room, which concerned Doe because it seemed like "[defendant's] level of agitation was increasing." Mother was in the room while defendant was acting this way.

Defendant eventually picked up a sword that was near the front door. He moved the sword from side to side, pointing at objects and mock swinging it. Doe was four to five feet from defendant and Mother was eight to 10 feet from defendant while he was mock swinging it. Defendant continued to rant about police, saying that they "need to be fathers," and that he would "'drive their dicks into the ground,'" and "take them all out." Defendant eventually swung the sword at Doe's neck, stopping and holding the blade on

Doe's neck for 15 to 30 seconds. While holding the sword to Doe's neck, defendant stated: "'I could take you out right now.'" After removing the sword from Doe's neck, defendant told Doe that Mother's side of the family never supported or agreed with him, and expressed anger at Doe and certain of Doe's relatives.

Several times during defendant's outbursts, Mother whispered to Doe that she did not want to be there and wanted Doe to take her away. Doe asked defendant if he could take Mother to his aunt's house. Defendant "lost it" and began yelling at Doe. Defendant told Doe he could not take Mother away and that Doe needed to "[g]et the hell out of here." Doe left defendant's house without Mother because he did not believe defendant would allow Mother to leave. Defendant followed Doe to the door. As Doe got partway down the front walkway defendant yelled at him to run.

Doe drove to a nearby parking lot and called the police. This 911 call was recorded and played for the jury. Doe told 911 dispatch that he was concerned for Mother's safety because defendant was acting irrationally and brandishing a sword. Doe told dispatch that he believed defendant had been drinking. Doe said defendant was under significant stress and was becoming "imbalanced." He also said that defendant had firearms in his house.

Riverside County Sheriff's Deputy Michael Mosca responded to defendant's house around 2:00 p.m. Defendant was outside his house when Deputy Mosca first arrived, but he went back inside when he saw Deputy Mosca. Defendant refused to respond to Deputy Mosca's requests to stop or exit the residence. Deputy Brent Innes

arrived about five minutes later, and defendant also refused to comply with his demands. Deputy Innes attempted to coax defendant out of the house using his car's public address system and by calling defendant's phone, but defendant refused to leave the house. Defendant's refusal to respond to or comply with police demands escalated into a nearly 10-hour long standoff between defendant and the police, which grew to include the Riverside County Sheriff's Department's SWAT and crisis negotiation teams.

While defendant was barricaded in the house, officers attempted to contact defendant by phone, via the public address system, via a robot, and by using a recorded message from his son. Though defendant sometimes answered the phone for a few seconds, and sometimes left the house to yell things at the police or play a guitar, defendant refused to comply with any of the officers' demands.

Meanwhile, Deputy Innes spoke with Doe. Doe told Deputy Innes that he feared for his and Mother's lives when defendant began swinging the sword. Doe told Deputy Innes that defendant had "ranted . . . before when he's been drinking." However, Doe said he did not notice any smell of alcohol on defendant's breath or any slurred speech on that date.

Mother exited the house unharmed around 9:00 p.m. Once Mother exited the house, SWAT officers began trying to get defendant to leave by using light sound diversionary devices and tear gas. This drove defendant to the basement, and eventually out of it. Officers apprehended and arrested defendant as he exited the basement around 11:45 p.m.

B. *Defense Evidence*

Prior to October 4, 2014, Doe and defendant had multiple conversations about Doe bringing Mother's property down to defendant's residence. This was a source of contention between Doe and defendant. Defendant knew Doe would be bringing this property down on October 4, but Doe did not tell defendant when he would be arriving. Doe arrived at defendant's house around 6:30 a.m. When Doe arrived at defendant's house, Doe hopped defendant's fence and knocked on his bedroom window to wake him up. Defendant was irritated with Doe for arriving in this manner, but was not agitated and did not engage in any argument with him. Doe left for church about a half hour after arriving, and intended to return afterwards.

When Doe returned in the afternoon, defendant and Doe began to argue. Defendant was unhappy with the way Doe had been taking care of Mother. Defendant was also unhappy with Doe's handling of Mother's finances. Defendant denied ranting about religious matters. Defendant admitted he picked up the sword, but denied swinging it at Doe or Mother, denied placing it to Doe's neck, and denied telling Doe he could kill him. Doe asked if he could take Mother with him and leave. Defendant told Doe to get out and not to take Mother with him. Defendant did not have the sword when he told Doe to leave. Defendant followed Doe and let him out of the front gate, but did not tell him to run. Defendant admitted to drinking after the police arrived but denied drinking any time before that.

After Mother left, she spoke with Deputy Julie Zaborowski. According to Deputy Zaborowski, Mother said she had not been held against her will, that she was free to leave at any time, and that defendant did not threaten or physically harm her. However, Mother told Deputy Zaborowski she no longer wanted to live with defendant in part because she did not feel safe with him.

C. *Procedural Background*

Defendant was charged and tried by a jury for four separate counts: assault with a deadly weapon (§ 245 subd. (a)(1); count 1), criminal threats (§ 422; count 2), elder abuse in the form of false imprisonment (§ 368, subd. (f); count 3), and misdemeanor obstructing a police officer (§ 148, subd. (a)(1); count 4). Counts 2 and 3 included allegations that defendant used a weapon. (§ 12022, subd. (b)(1).) After trial, the jury found defendant guilty as to count 4, and guilty as to count 2's lesser included offense of attempted criminal threats. The jury also found the weapon use enhancement for count 2 true. At sentencing, the court placed defendant on probation with credit for time served totaling 261 days. (§§ 2900.5, 4019.)

III. DISCUSSION

Defendant argues his trial counsel ineffectively assisted him because she did not request a jury instruction on voluntary intoxication. Defendant also argues that the trial court miscalculated his presentence custody credits. We affirm the judgment but remand with directions to correct defendant's presentence credits.

A. *Defendant's Trial Counsel Was Not Constitutionally Deficient*

During the parties' discussion on jury instructions, the court indicated that it was going to instruct the jury regarding voluntary intoxication. Defense counsel did not want the jury so instructed because "there is evidence [defendant] said he was drinking some beer when the police were there later," but "I don't think there was anything that indicates he was drunk at the time." The court and prosecutor agreed with defense counsel, and the court removed the instruction.

On appeal, defendant claims trial counsel's decision to decline the voluntary intoxication instruction deprived him of the effective assistance of counsel. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies were prejudicial, that is, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Mai* (2013) 57 Cal.4th 986, 1009.)

When considering the first of these prongs "a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai, supra*, 57 Cal.4th at p. 1009.) On direct appeal, a reviewing court will reverse a conviction only if "(1) the

record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*Ibid.*)

Defendant admits that "a trial court has no duty to instruct on its own motion on voluntary intoxication." (*People v. Wader* (1993) 5 Cal.4th 610, 643.) Voluntary intoxication is relevant to the issue of whether a defendant *actually* had the requisite specific mental state required for commission of a crime. (*People v. Horton* (1995) 11 Cal.4th 1068, 1119, citing *People v. Saille* (1991) 54 Cal.3d 1103, 1108, 1115-1116.) However, an instruction on the significance of voluntary intoxication is a "pinpoint" instruction that need only be given upon request. (*People v. Rundle* (2008) 43 Cal.4th 76, 145.) Such an instruction is required only "when there is substantial evidence of the defendant's voluntary intoxication" and substantial evidence that the "intoxication affected the defendant's" formation of the required specific intent. (*People v. Williams* (1997) 16 Cal.4th 635, 677.) Here, defendant behaved irrationally, and Doe surmised he had been drinking because he had "ranted" before when he had been drinking. However, on this occasion Doe did not notice any alcohol on defendant's breath nor any slurred speech. There was no evidence of defendant's voluntary consumption of alcohol or any other intoxicating substances prior to the commission of the offenses with which he was charged. Moreover, defendant specifically testified that he did not have any alcohol prior to the time the officers arrived. The evidence presented at trial was insufficient to warrant the giving of a pinpoint instruction.

Even if we were to assume that this scant evidence constituted substantial evidence, there was no evidence that voluntary intoxication affected defendant's ability to formulate the required specific intent. Thus, counsel was not deficient in failing to request an instruction on voluntary intoxication.

A voluntary intoxication instruction is not automatically required whenever the evidence shows the defendant ingested drugs or was drinking prior to committing the criminal act. For example, evidence that a witness testified the defendant was "'probably spaced out,'" or "'doped up'" around the time of the crimes is insufficient to warrant a voluntary intoxication instruction. (*People v. Williams, supra,* 16 Cal.4th at p. 677; see also *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661-1662; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180 [defendant had drunk 8-10 beers on the night of the crime and "was higher" than he had been a few days later with a blood-alcohol level of .14].) Thus, even if counsel had requested the instruction in this case, the court was not required to give it.

Further, the record demonstrates that counsel had a rational tactical reason to refuse this instruction: defendant's defense at trial was that he was not intoxicated and that Doe lied about this and other facts. During closing argument, defense counsel argued that Doe was the only witness who testified defendant acted delusional or dangerous, that defendant threatened him, or that defendant touched him with the sword. Defendant's theory of the case was that Doe invented or exaggerated the details of the argument and only called the police because he was "trying to get [defendant] in trouble." This attack on Doe's credibility and reliability included arguments that Doe was lying

about defendant drinking the morning of the incident. Indeed, defense counsel conceded defendant had not been drinking, rhetorically asking why Doe "would . . . tell the 911 operator that [defendant] has been drinking when he hasn't?"

Counsel is not ineffective where he or she refuses an instruction that would be inconsistent with defendant's theory of the case. (*People v. Wader*, *supra*, 5 Cal.4th at p. 643 [counsel not ineffective for failing to request voluntary intoxication instruction because "[a]n instruction on voluntary intoxication as negating specific intent would have been inconsistent with defendant's theory of the case."].) Because there was a valid tactical reason for counsel's decision to refuse the voluntary intoxication instruction, defendant was not deprived of effective assistance of counsel.

The decision to reject a voluntary intoxication instruction was consistent with defendant's defense at trial, and we affirm the judgment.

B. *The Case Is Remanded to Correct Defendant's Presentence Credits*

Defendant also claims that the trial court miscalculated his presentence credits by failing to account for time spent after he was rendered competent but before his release from the state hospital's custody. Defendant requests that the case be remanded for resentencing and that the minute order imposing his sentence be modified to add 10 days to his presentence credits. The People agree with defendant's claims and requested relief. We agree with the parties.

1. Relevant Background

Defendant was initially taken into custody from October 4, 2014, to October 5, 2014, for a total of two days. He was released on bail and remained out of custody for the next two years while both parties requested and obtained multiple continuances. On August 11, 2016, defense counsel brought an oral motion pursuant to section 1368, subdivision (b), expressing doubt as to defendant's competency to stand trial. The trial court suspended proceedings and ordered defendant to be examined by two doctors to determine whether he was competent to stand trial, pursuant to section 1367 et seq. On October 18, 2016, the court found defendant incompetent to stand trial and remanded him into custody. He remained in county custody pending placement into a mental health treatment program until January 5, 2017, for a total of 80 days. Defendant was then transferred to a state hospital for mental health treatment, where he stayed for 96 days, from January 6, 2017, to April 11, 2017. Defendant was determined to be competent to stand trial on April 3, 2017. On April 12, 2017, defendant was transferred back to county jail. He posted bail the same day, for a total of one additional day in county custody.

Both defendant's probation officer and the court calculated defendant's presentence custody credits the same way. They determined that defendant had 83 days of confinement credit for time spent in county jail (two days plus 80 days plus one day), 82 days for conduct credits (83 days of confinement rounded down to the nearest even number),[2] and 96 days for state hospital time. This totaled 261 days of presentence

[2] See *People v. Chilelli* (2014) 225 Cal.App.4th 581, 588.

credit. At sentencing, the trial court ordered defendant to serve 261 days in county jail. However, both the court and probation officer miscalculated the credits defendant earned while in the state hospital by failing to account for conduct credits to which he was entitled after regaining competency.

2. Analysis

"The failure to properly calculate custody and conduct credit is a jurisdictional error that can be corrected at any time." (*People v. Chilelli, supra*, 225 Cal.App.4th at p. 591.) Section 1237.1 generally prohibits appeals based on an error in the calculation of presentence custody credits unless the defendant first presents the claim in the trial court. However, "section 1237.1 does not require a motion be filed in the trial court . . . when there are other issues raised on direct appeal." (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420.) Because defendant also alleges that he was ineffectively assisted by his trial counsel, defendant did not need to raise his presentence custody credit issue with the trial court before appealing.

In addition to credit for the actual period of confinement, a defendant may accrue additional conduct credits at a rate of two days for every two days of confinement, rounded down to the nearest even number if the confinement period is an odd number of days. (*People v. Chilelli*, *supra*, 225 Cal.App.4th at p. 588.) However, a defendant does not accrue conduct credits while receiving mental health treatment. (*People v. Waterman* (1986) 42 Cal.3d 565, 570 ["The goal of treatment for incompetence seems particularly inconsistent with an incentive-credit system . . . ."]; *id.* at p. 571.) Thus, where a

defendant is initially incompetent to stand trial but later becomes competent, they are only entitled to credits for the actual period of confinement in the hospital, and not conduct credits. (*People v. Bryant* (2009) 174 Cal.App.4th 175, 182.) However, a defendant does accrue conduct credits once he regains his competency, even if he remains confined in a state hospital for some period afterward. (*Ibid*.)

This means defendant accrued confinement and conduct credits beginning April 3, 2017, until his release on April 12, 2017. After examining the record, we find that defendant should have been awarded 92 actual days in confinement, 92 days of conduct credit for this time, and 87 days of state hospital time. Adding these credits up, we agree with the parties that defendant was entitled to 271 days of presentence custody credits, not 261.

IV. DISPOSITION

The matter is remanded to the trial court with directions to award defendant 271 days of presentence custody credits and to prepare a supplemental minute order reflecting this change of presentence credits. In all other respects, the judgment is affirmed.

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FIELDS
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.